

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DANNY LYNN CLAIBOURN**  
Claimant

VS.

**LITTLE BEAR TRANSPORTATION, INC.**  
Respondent

AND

**GREAT WEST CASUALTY CO.;**  
**TRAVELERS INDEMNITY CO.**  
Insurance Carriers

Docket Nos. 1,019,385  
1,028,389

**ORDER**

**STATEMENT OF THE CASE**

Respondent and one of its insurance carriers, Great West Casualty Co., (Great West) requested review of the March 6, 2007, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. The ALJ ordered that "Dr. MacMillan continues to be the Authorized Treating Physician for all treatment tests and referrals related to the July 3, 2003, accident."<sup>1</sup> The ALJ also ordered insurance carrier Great West to immediately arrange for claimant's medical treatment and to be responsible for payment of the medical treatment.

William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Alexander B. Mitchell, II, of Wichita, Kansas, appeared for respondent and its insurance carrier, Great West. Brian R. Collignon, of Wichita, Kansas, appeared for respondent and its insurance carrier, Travelers Indemnity Co. (Travelers).

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<sup>1</sup> ALJ Order (Mar. 6, 2007).

The record is the same as that considered by the ALJ and consists of the transcript of the February 21, 2007, Preliminary Hearing, together with the pleadings contained in the administrative file.<sup>2</sup>

The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>3</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>4</sup>

By statute, preliminary hearing findings, conclusions and orders are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to having been determined by the entire Board, as it is when the appeal is from a final order.<sup>6</sup>

### **ISSUES**

Respondent and Great West, argue that claimant's hip and back condition was not caused by work-related injuries but was, instead, a result of the natural aging process or normal activities of day-to-day living. Accordingly, respondent and Great West contend that the ALJ's order that Great West provide medical treatment for claimant's back and hip should be reversed. In the alternative, respondent and Great West contend that claimant's hip and back conditions were aggravated by subsequent falls, climbing, and lifting at work during periods when respondent's insurance coverage was also provided by Travelers. Under those circumstances, respondent and Great West argue that Great West and Travelers should be jointly and severally liable for the cost of claimant's medical treatment.

Respondent and its insurance carrier, Travelers, argue that the Board may not consider either the discovery deposition of claimant or the independent medical examination (IME) report of Dr. Jeffrey MacMillan because these items were not part of the

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<sup>2</sup> The Division's computer dockets show a preliminary hearing was also held on July 12, 2006, in both of these two docketed claims but that no entries were made of that hearing.

<sup>3</sup> K.S.A. 2006 Supp. 44-551(b)(2)(A).

<sup>4</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2006 Supp. 44-555c(k).

record available to the ALJ. Respondent and Travelers further argue that the Board does not have jurisdiction over the issues concerning whether claimant is entitled to receive medical benefits as a result of the accident involved in Docket No. 1,019,835, which insurer should be responsible for the payment of medical treatment for claimant's injury, or whether liability should be assessed jointly and severally between Great West and Travelers.

Claimant argues that evidence in the form of Dr. MacMillan's IME report and claimant's uncontroverted deposition testimony shows that claimant's injuries to his left knee, right hip, and back are accidental injuries which arose out of and in the course of his employment with respondent. Accordingly, claimant requests that the Board affirm the Order of the ALJ.

The issues for the Board's review are:

(1) Is the Board able to consider the IME report of Dr. Jeffrey MacMillan or the discovery deposition of claimant?

(2) Did claimant suffer personal injury by accident or accidents which arose out of and in the course of his employment with respondent?

(3) If so, did claimant suffer a series of work-related accidents and aggravations, or are his injuries the natural consequence of a single accident that occurred on July 3, 2003?

(4) Did claimant's disability result from the natural aging process or by the normal activities of day-to-day living?

(5) Does the Board have jurisdiction to decide the issue of whether the ALJ erred in ordering Great West to be responsible for payment of medical treatment resulting from claimant's July 3, 2003, accident?

(6) If so, should responsibility for payment of medical treatment to claimant's hip and back be assessed jointly and severally between Great West and Travelers?

#### **FINDINGS OF FACT**

In Docket No. 1,019,385, claimant filed an Application for Hearing on October 7, 2004, claiming "[g]eneral bodily disability, back, left knee and all other parts of the body affected" as a result of an accident that occurred on July 3, 2003.<sup>7</sup> Great West had the insurance coverage for this alleged date of accident.

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<sup>7</sup> Form K-WC E-1 Application for Hearing filed Oct. 7, 2004.

In Docket No. 1,028,389, claimant filed an Application for Hearing on April 10, 2006, claiming "general bodily disability back, both hips and both legs" "each and every working day ending February 5, 2006."<sup>8</sup> The Division's records show that Travelers provided workers compensation coverage for respondent from September 17, 2005, to September 19, 2006.

On July 13, 2006, the ALJ ordered that Dr. Jeffrey MacMillan perform an IME of claimant, requesting a diagnosis and treatment recommendations and authorizing Dr. MacMillan to provide treatment, if necessary. The ALJ also requested that Dr. MacMillan give an opinion as to:

Which of the following causal factors is responsible for [claimant's] need for right hip replacement?

Natural degenerative changes?

Natural and probable consequence of the July 3, 2003 injury to the left knee?

A subsequent work injury occurring each and every day alleged to back, both hips and legs ending February of 2006. An injury includes an aggravation or acceleration of a pre-existing condition.

Other Causal factors?<sup>9</sup>

This IME was performed on September 18, 2006. Dr. MacMillan's IME report to the ALJ is dated September 18, 2006, but shows it was faxed on either September 21, 2006, or March 29, 2007. Both of these dates appear imprinted at the top of the report. The IME report contained within the Division's (ALJ's) administrative file is not file-stamped received. However, the Divisions's (ALJ's) computer docket entry shows that the IME report was received on April 2, 2007.

Although a Preliminary Hearing was held on February 21, 2007, no testimony was taken, only statements by counsel. Claimant's attorney argued that although Dr. MacMillan was authorized to treat claimant, both Great West and Travelers refused to provide the treatment by Dr. MacMillan. Claimant's attorney requested that claimant be allowed to select his own authorized medical provider. But at that hearing, respondent and its insurance carriers disputed the compensability of these claims. Respondent and Travelers argued that claimant's condition was either the natural consequence of claimant's July 3, 2003, injury, or was the result of age-related degenerative changes. Respondent and its insurance carrier, Great West, argued that claimant's impairment for his back, right knee, and right hip are a result of age-related degenerative conditions and are not the result of his July 3, 2003, incident.

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<sup>8</sup> Form K-WC E-1 Application for Hearing filed Apr. 10, 2006.

<sup>9</sup> ALJ Order (July 13, 2006).

The ALJ's Order of March 6, 2007, indicated that Dr. MacMillan should continue to be authorized as claimant's treating physician and ordered Great West to be responsible for payment of his treatment of claimant and to immediately arrange for that treatment.

In their respective briefs to the Board, respondent and Great West and claimant reference a discovery deposition taken by claimant. However, no transcript of a deposition of claimant has been made a part of the record in either of these docketed claims.

Respondent and Great West and claimant reference the IME report of Dr. MacMillan in their respective briefs to the Board. The record, however, reveals that Dr. MacMillan's report was not made available to the ALJ until either March 29, 2007, or April 2, 2007, more than three weeks after the ALJ issued the Order which is the subject of this appeal.

#### **PRINCIPLES OF LAW**

K.S.A. 2005 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The Supreme Court in *Schmidtlien*<sup>10</sup> held:

Under workers compensation law, the claimant bears the burden of proof to establish his or her right to an award of compensation and to prove the various conditions on which his or her right depends. Failure to prove that the injury arose out of and in the course of employment is fatal to a workers compensation claim.

K.S.A. 44-555c(a) states in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

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<sup>10</sup> *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, Syl. ¶ 2, 104 P.3d 378 (2005).

**ANALYSIS**

The Board can only consider the evidence offered by the parties, that was admitted into the record by the ALJ and considered by the ALJ. This record contains no evidence, only statements of counsel. No testimony was presented at the February 21, 2007, Preliminary Hearing. The IME report by Dr. MacMillan was not received by the ALJ until after he entered his March 6, 2007, Order. A discovery deposition transcript was neither offered and admitted, nor was one submitted by a stipulation of the parties. The record is devoid of evidence that claimant suffered an injury by an accident which arose out of and in the course of his employment with respondent.

**CONCLUSION**

The Board cannot consider the IME report of Dr. Jeffrey MacMillan or the purported discovery deposition of claimant. As such, claimant has failed to meet his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment with respondent.<sup>11</sup>

All other issues are moot.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of the Board that the preliminary hearing Order of Administrative Law Judge Thomas Klein dated March 6, 2007, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2007.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Alexander B. Mitchell, II, Attorney for Respondent and its Insurance Carrier Great West Casualty Co.  
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier Travelers Indemnity Co.  
Thomas Klein, Administrative Law Judge

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<sup>11</sup> The ALJ's July 13, 2006, Order was not appealed and, therefore, remains in effect.